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In the Supreme Court of the United States

OCTOBER TERM, 1969

United States of America,

Petitioner,

v.

Urban Plumbing & Heating Co.,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Urban Plumbing & Heating Co.,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The respondent Urban Plumbing & Heating files its brief in opposition to the petition for Certiorari.

OPINION BELOW

The opinion of the Court of Claims is reproduced in the appendix to petitioner's brief and will not be reprinted.

JURISDICTION

The respondent disagrees with the statement of petitioner that this Court has certiorari jurisdiction [28 U.S.C. 1255(1)].

Section 28 U.S.C. 1255 (1) provides generally that this court may review opinions of the Court of Claims by certiorari.

Petitioner claims that the Court of Claims' decision is final (Pet. Br.) although admitting it is interlocutory at the same time (Pet. Br. 1, n. 1).

The petitioner's contention is that the remand by the Court of Claims to the Armed Services Board of Contract Appeals for a determination of the matter of damages is to be disregarded for the purpose of finality.

Respondent disagrees. The Court of Claims has retained complete jurisdiction of the case, and the Board has merely been directed to make a further finding. The element of damages may well be a very important matter to be ultimately disposed of, and if certiorari should be ultimately granted in this case, the damage element may well be a ground upon which respondent may itself seek certiorari if the Armed Services Board of Contract Appeals fails to make a proper finding, or if the Court of Claims should fail to enter a proper award.

In support of petitioner's claim for certiorari jurisdiction, petitioner cites three cases:

United States v. Caltex, Inc., 344 U.S. 149.

United States v. Central Eureka Mining Co., 357 U.S. 155.

United States v. Acme Process Equipment Co., 385 U.S. 138.

Each of those cases has been examined, and none appears to have any relevance to the point for which they are cited:

Caltex was a case where the army destroyed an oil refinery in the Philippine Island to keep it from falling into enemy hands. A direct action for compensation was brought in the Court of Claims, and this Court granted certiorari to consider the question of whether compensation was due under the constitution as a "taking of property."

Central Eureka was a case brought directly in the Court of Claims under a special statutory authority to review orders of the War Production Board irrespective of lapse of time, laches, or a period of limitation. The board had authorized closure of a gold-mining operation without taking the property or its equipment. This court granted certiorari because the Court of Claims placed a construction upon the statutory review authority to the effect that the legislaion was intended as a mandate to allow compensation. The Court of Claims' decision appeared to be final.

Acme Process was an original proceeding in the Court of Claims for damages for cancellation of a government contract. The defense was that the cancellation was motivated by a violation of the "antikickback" statute, and this court granted certiorari to review a Court of Claims' decision that the kickback statute did not authorize cancellation for such a violation under the facts of that case. The Court of Claims'

decision was final. The application of the three cases to the point for which they are cited is not apparent from reading of the reported decisions.

The decisions following appear to support a contrary conclusion:

Marconi Wireless Telegraph Co. of America v. *United States*, 320 U.S. 1.
American Construction Co. v. *Jacksonville T. & K. Ry. Co.*, 148 U.S. 372.
United States v. *Beatty*, 232 U.S. 463.
Heike v. *United States*, 217 U.S. 423.
Arnold v. *United States*, 263 U.S. 427.

CORRECTED STATEMENT

The statement of the case while correct in many details is incomplete or might be misleading.

The statement (Pet. Br. 3) that the completion date was important "because the contract work involved shutting down a portion of the base-heating plant which could not be done during the Alaskan winter" is misleading in that the contractor was not made aware of the fact that a portion of the plant could not be shut down during the winter; only the government knew of that fact.

For the first time, at the hearing before the Board did it first become known to the contractor that the base engineer refused to permit a shutdown of any portion of the plant. His decision, it was then discovered, was based upon a desire to have standby power and heat (Tr. 112) during the severe Alaskan winter.

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It is stated that the contract did provide that no time extension would be allowed for submission of material and equipment which did not fulfill the requirements (Pet. Br. 4). The statement is true, but that matter was not an issue in this case because while the respective manufacturers guaranteed that their respective products would "fulfill the requirements" (a fact stipulated to by one of the airforce attorneys immediately prior to the hearing after an appraisal of the situation by the government's own independently selected-engineer (Ex. 49 Portland)) equally as well or better than the named brand, the Board, the Court of Claims, and the contracting officer himself, each found that the delay was related to the failure to have someone available to approve or reject the products submitted (Pet. Br. App. 30 and 63), and was not related to a "failure of fulfillment of the requirements."

It is stated (Pet. Br. 4) that the architect-engineer advised orally that he would reject the coal scales and combustion air coils, if appointed.

This was, of course, not essential to the determination requested by the petition, but it might be misconstrued. The acual situation was that the government would not or did not make a determination whether or not the procurement office (to whom all submittals were made) would retain the function of "approval or rejection" of products submitted or would employ a third person (Tr. 450), and it was 38 days before they finally made that determination (Ex. A, Portland, Tr. 474).

It is true that the contractor promptly cancelled its orders with the proferred equipment manufacturers upon learning of the intended rejection *if the person making the remark was appointed as approval engineer* (incidentally, the engineer denied making any such (Tr. 477-9) remark). However, it is likewise apparent that the contractor could not place orders with any manufacturer "named or otherwise" until it had received the approval of the procurement office, and the government procurement officer so testified (Tr. 195).

He stated:

> "Normally, a contractor is taking a great risk to place orders and start production on supplies that have not been approved by the government since they may be upset, and that is part of government's claim."

As to the ash handling equipment rejection (Pet. Br. 5), the Board found that there was no reasonable excuse for failure to disapprove of the ash handling equipment until August 29 (Pet. Br. App. 63). No appeal was taken from that finding nor objection to it made by the government in the Court of Claims.

Reference to the 69 days (Pet. Br. 5) as being generous to the contractor is not an accurate statement of fact. As one example, it was admitted that 69 days arithmetical extension in a mid-Alaska winter is not equal to 69 days in midsummer (production schedule changes and many other factors were involved).

The board itself held that the extension of 69 days was inadequate and that cancellation would have been unthinkable. The government took no appeal from those findings nor ever made an objection thereto (Pet. Br. App. 32, 33).

The petitioner's statement (p. 7) states that the board's determination was based upon the ground that plaintiff's claim was barred by the supplemental agreement. The cited reference is a general reference to the board's opinion (Pet. Br. 7 and 45). The reason for the general citation to the entire opinion rather than to a particular part is that the board's opinion did not so state, although an inference of such a determination may be made.

There are other discrepancies, but it is felt that none is important enough to affect this court's determination of the petition for certiorari.

A simple summary of the case is: (1) that there was a short-term completion contract for modification of a heating plant in Alaska; (2) that in conformity with the contract, the contractor offered drawings for certain products for approval or disapproval; (3) the government did not, could not, or would not, determine whether or not to appoint an independent approval engineer; (4) that after 38 days' delay, it finally appointed such an engineer who according to both the Armed Services Board of Contract Appeals, and the Court of Claims unduly delayed in disapproval of some of the items submitted; (5) the contracting officer knew that an extension would be

necessary and learned privately that the base engineer would not permit completion in sequence because of the onset of the Alaskan winter and the necessity to maintain standby equipment; (6) it was privately determined within the government to force acceptance of an extension by an offering of an inadequate extension or in the alternative to demand the contractor perform over a total period of one year (365 days) under threat of cancellation.

The court found that under the special facts of this case, that this constituted duress and remanded the case to the board for a determination of damages.

REASONS FOR DENYING THE WRIT

Basically, the government's argument is that the Court of Claims has extended the legal concept of duress and has thereby restricted the government's power in contract negotiation matters where a negotiator has asserted an unfounded contract right (Pet. Br. 9), accompanied by a threat of cancellation.

Simplified, the government contends that the rule should be that to avoid a charge of duress, all is required is that the contracting officer contends, "Well, I thought I was right when I threatened the contractor."

To bring this within a recognizable ground of certiorari, the petitioner claims that the decision is in conflict with *Hartsville Mills* v. *United States*, 271 U.S. 43.

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The argument relating to the government's bargaining power is incorrect, and further, it is not a ground for certiorari.

The Court of Claims' opinion in *Urban* made a complete and thorough analysis of the federal law of duress, and petitioner itself states that *Hartsville Mills* is probably not the law today (Pet. Br. 13). That concession would be sufficient to deny the petition but *Hartsville Mills* is not authority for the proposition for which it is stated.

The best analysis of that case can be made by reference to the later case of *Hazelhurst Oil Mill and Fertilizer Co.* v. *United States*, 42 F.2d 331 (1930) wherein it was stated (p. 338) as follows:

> "It is urged on behalf of defendant that the plaintiff is precluded from any recovery by the language used in the opinion of the Supreme Court in *Hartsville Oil Mills* v. *United States*, 271 U.S. 43, the plaintiff therein being a corporation which was in the same position as this plaintiff but the language of the Supreme Court on which the defendant relies we think was intended to apply only to the evidence in that case, which was far from being complete with reference to plaintiff's inquiry and the nature thereof."

The court in *Hazelhurst Oil* then quotes directly and far more extensively than does petitioner on page 13 of the brief from the *Hartsville* case pointing out that the language was intended to refer only to the failure to prove damages.

A reference to the citator and to Williston indi-

cates that the Court of Claims has not failed to follow *Hartsville.* In fact, dozens of claims were later allowed by the Court of Claims without any objection by the government.

Petitioner calls attention in the brief to the footnote in *Anthony Grace;* it is contrary to the contention of petitioner. (*United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424).

It states that:

> "findings and conclusions of the Board of Contract Appeals do not have the same finality on review."

The comparison was to the finality of a decision of the labor arbitrator in *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, as compared with finality of decisions of the Board of Contract Appeals.

The decision in *Anthony Grace* related to a case where the successful bidder on a government contract proposal did not execute the final contract within the time specified by the bid, and the contract was terminated as provided in the offer. An appeal to the Board of Contract Appeals was dismissed as being untimely on appeal; the Court of Claims assigned the case to one of its commissioners as a fact finder instead of remanding to the Board.

The court granted certiorari and held that the administrative record must be made in the Board of Contract Appeals and not in the Court of Claims.

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As to the conclusiveness of the record, the court merely held that the Court of Claims is restricted to the RECORD made in the Board and can not take original evidence.

The court referred to its decision in *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, and approved (p. 428) two procedures when the board has not considered an incidental matter. One, where the record was complete enough to grant judgment for the contractor, it could do so; and two, where the court did not believe the administrative record permitted it to enter a judgment for the contractor, it could stay its own proceedings and remand to the agency for further action.

The latter course is exactly what the Court of Claims has done in this case. It has retained jurisdiction, and it has directed the Board of Contract Appeals to make an equitable determination of the matter under the terms of the contract.

Further, the court in *Anthony Grace* went so far as to state that if the board demonstrated an unwillingness or incapacity to act, a contractor may conclude that those procedures have become "unavailable," and he may proceed directly in the Court of Claims.

The following cases and texts in addition to *Hartsville Mills* previously discussed are cited by petitioner relative to the question of duress.

a) *United States* v. *Bethlehem Steel*, 315 U.S. 289 as to a threat to breach a contract.

b) *Portland Hotel Corp.* v. *Fidelity Storage Corp.*, 134 F.2d 57.

c) 5 Williston, *Contracts* § 1606.

d) Footnote citations (p. 13) as follows:

Williamson v. *Bendix Corp.*, 289 F.2d 389, 392-3 (C.A. 7).

W. R. Grimshaw Co. v. *Nevil C. Withrow Co.*, 248 F.2d 896, 903-905 (C.A. 8).

Bennett v. *Mahon*, 180 F.2d 224, 231 (C.A. 8) (certiorari denied).

Vines v. *General Outdoor Advertising Co.*, 171 F.2d 487 (C.A. 2).

Tri State Roofing Co. of Uniontown v. *Simon*, 142 A.2d 333.

Gill v. *S.H.B. Corporation*, 34 N.W.2d 526.

Val-Rich Corporation v. *Tole Electric Co.*, 196 So. 2d 486.

It is contended (Pet. Br. 13) that a threat must be made in bad faith to constitute duress and further, that the other party was not in a position to have obtained an adequate remedy by suing for damages if the threat were carried out, and the following are cited:

King Construction Co. v. *W.M. Smith Electric Co.*, 350 S.W.2d 940.

Ross Systems v. *Linden Dari-Delite, Inc.*, 173 A.2d 258.

It is contended (Pet. Br. 13) that where contract amendments have been voided for duress, both bad faith and lack of adequate legal remedy was clear, and the following are cited:

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Aircraft Associates v. *United States*, 357 F.2d 373.

W.R.B. Corp. v. *United States*, 183 Ct. Cl. 409, 468-9.

Shewan & Sons v. *United States*, 73 Ct. Cl. 49, 79-95.

Cf. Alloy Products Corporation v. *United States*, 302 F.2d 528, 530.

Hellenic Lines, Ltd. v. *Louis Dreyfus Corp.*, 372 F.2d 753, 756, 758.

5 Williston, *Contracts* 4529-4533, § 1620.

5 Williston, *Contracts* 4501-4502, § 1606.

Automatic Radio Mfg. Co. v. *Hazeltine Research*, 176 F.2d 799, 804-805.

and they are cited for the proposition that none of the authorities suggests that a threat to cancel a contract not subject to cancellation is duress per se.

Bethlehem Steel is an interesting case. It held:

> "Here, it is suggested that feebleness is on the side of the Federal Government of the United States, overpowering strength on the side of a single private corporation. Although there are many cases in which an individual has claimed to be a victim of duress in dealings with the government e.g. *Union Pacific R. Co.* v. *Public Service Comm.*, 248 U.S. 67, this, so far as we know is the first instance in which government has claimed to be a victim of duress in dealings with an individual."

The case pointed out no duress was present since the government could have commandered the plant or compelled the corporation to produce at a price set by the government.

The case has absolutely no factual or legal comparison to the *Urban* case.

Portland Hotel was a case where a landlord threatened eviction unless a tenant consented to an increased rental which was then consented to. Under a claim that the increase was secured by duress, the court held the threat was insufficient to constitute duress.

The case does not appear applicable.

5 Williston, *Contracts*, has previously been cited, and petitioner's brief admits that modern law has abandoned the older rules of duress.

The footnote citations for the proposition that a threat must be made in bad faith and without an adequate remedy are contrary to the petitioner's citation to Williston but are commented upon as follows:

Williamson was a case where an individual claimed the Bendix corporation refused to employ him permanently under a contract for permanent employment. The company defended on the ground of a release which the proposed employer claimed was secured by duress, coercion and under undue influence.

The parties treated the entire claim as duress which under Indiana Law was defined as a threat of bodily restraint to compel execution of an agreement.

Plaintiff was a lawyer and clearly understood the release, its import, and effect upon him.

The case would appear to be obviously inapplicable to the present matter.

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Grimshaw was a case where a subcontractor claimed that he was not required to finish stools and sills as shown on the contractor's plans.

The court held that where the facts which are alleged to constitute duress are not in dispute, the question is one of law. The court held that the fact that the contractor had advised the subcontractor that if it did not perform, it would perform the contract itself or by others was not duress under the facts of the case.

While there is some language to support the proposition for which it is stated, the final conclusion is:

On consideration of the whole record, no facts were present sufficient to support a finding of duress.

Bennett was a case where one party brought action to compel specific performance of an agreement for a partnership relating to the garbage collection of Kansas City, Kansas. The court held the agreement entered into was not entered into by duress; the court holding that the mere refusal to carry out a contract does not in and of itself constitute duress.

The case would not appear to be factually applicable.

Vines was a case involving a claim for quantum meruit services as a salesman of outdoor advertising. The evidence showed that the company advised that it would not enter into a new contract unless certain amounts claimed under a previous contract were waived.

The court stated:

> "The law of duress has been much extended; it is inconsistent with the modern theory of duress to assert as an infallible rule that threatened repudiation of contractual obligation can not amount to duress (citing Williston, § 1620)."

The court did state that the mere threat to repudiate a debt unless the obligee will enter into a contract will not *without more* avoid it.

The case would appear to have no factual application.

Tri State Roofing was a case involving a claim of a "subcontractor" to recover under a roofing contract opposed by claim for delay by the general contractor which was met by a claim for a release from liability for delay and a claim that the release was secured by duress in that the subcontractor threatened not to perform the contract unless the release was signed.

The court stated:

> "To constitute duress or business compulsion, there must be more than a mere threat which might possibly result in injury at some future time, such as a threat of injury to credit in the indefinite future. It must be such a threat that in conjunction with other circumstances and business necessity, the party so coerced fears a loss of business unless he does so enter into the contract as demanded (Reference as to 79 ALR 655-669)."

The case does not appear to be authority for the proposition stated either factually or legally.

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Gill was a case where an owner refused to pay his obligation to a contractor unless the contractor executed a release of all claims.

The court stated that this alone would not constitute duress but analyzed other cases in which that fact coupled with the same financial distress and other facts would constitute duress.

The case if applicable probably holds contrary to the proposition for which it is cited.

Val-Rich was an equity suit for foreclosure of a mechanic's lien in which a defense of duress was alleged claiming that a mechanic caused delay and the lien itself constituted duress.

The court held that this alone when there was a full legal remedy would not constitute duress unless something further were pleaded and the defense was stricken.

The case is likewise not factually or legally applicable.

King Construction was a case where an oral contract for the purchase of a crane was held invalid where the seller proposed to furnish a crane it knew would not meet specification of purchaser's contract with the Atomic Energy Commission, and thereby forced purchaser to get a crane for nearly double the contract amount when purchaser could not secure the crane from any other manufacturer, and no agreement was made to rescind the oral contract.

The case is cited for the proposition that bad faith

was found. The case does not so state. The lower court held there was no duress; the appellate court found to the contrary. The lower court's decision was to the effect that the purchaser executed the second contract out of "fear of economic loss" only which did not constitute duress.

The appellate court merely stated that the seller took "undue advantage of the purchaser."

The appellate court held that "fear of economic loss" did constitute duress (p. 942).

Ross-Systems was a case involving a claim for overcharges for a franchised ice cream mix.

The court said that duress exists when payments are made under duress or "business compulsion" where induced by the wrongful pressure of the payee, and the payor has no immediate and adequate remedy in the courts to resist them.

The lower court had held that the franchisee could have refused payment and defended himself in court.

The appellate court held that adequacy of legal remedy is not a narrow term and embodies the exigencies of the situation in which the victim finds himself.

Aircraft Associates held that a decision of Armed Services Board of Contract Appeals was a decision upon a question of law and was not entitled to finality under the Wunderlich Act.

The facts are that certain airplane parts on planes

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sold by the government had been removed. The contracting officer demanded a release of a claim for the parts as a condition to payment of other obligations and extension for payment of obligations to the government.

The ASBCA held there was no duress. The Court of Claims disagreed, pointing out that the officer knew of the removal of parts and that the extraction of a promise based upon the fault of the promisee constituted duress.

The case is admittedly authority for *Urban's* position, and factually, is almost identical with the case now petitioned; yet, petitioner attempts to cite it for a contrary proposition.

Shewan was exactly contrary to the statement of counsel as to the proposition for which it was cited. The case involved the government holding payment clearly due until the contractor would agree to a complete release of unrelated matters.

The court held the government can not take advantage of its own default to exact a release of substantial claims. Further, that the court held that the conduct of defendant exended beyond the breach of contract remediable at law and constituted duress.

(It should be remembered that here in *Urban* the contracting officer withheld payment from Urban which was later ordered paid by Air Force Attorneys who could find no excuse for withholding it since the amount withheld was admittedly due to the contractor. The contractor could not

release his bond until the claim was paid, and although the withholding was not connected with the execution of the supplemental agreement, it illustrates the propensities of the contracting officer.)

The case of *Freund* v. *United States*, 260 U.S. 60, 67, 70 is cited. In *Freund* a threat to cancel a contract was held by the Supreme Court to constitute duress, and the Court of Claims was reversed with a substantial award allowed.

The court also cited *Union Pacific Railroad Co.* v. *Public Service Commissioner of Missouri*, 248 U.S. 67, 70, where the court pointed out that the government and the contractor are not on equal terms, and the fact that it might indulge in vexatious litigation does not prevent a claim for duress.

There is nothing "per se" about a holding that the factual situation in *Urban Plumbing* constituted duress when the Supreme Court supports the opposite view from that suggested as a reason for granting certiorari.

Alloy Products (*Alloy Products* v. *United States*, 302 F.2d 528, 530) is cited as a case for compulsion, and comparison is suggested.

No comparison seems possible. The Court of Claims was asked to set aside a renegotiation agreement entered into between the plaintiff and the government after studies by competent lawyers for both parties.

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The court found that there was no evidence that the plaintiff had been unlawfully constrained or compelled by another to perform under circumstances which prevented the exercise of a free will.

The case is not factually or legally comparable.

Hellenic Lines is cited under an admission (Pet. Br. 14) that the modern tendency is to regard any transaction as voidable which the party seeking to avoid was not bound to enter into, and which was coerced by fear of a wrongful act by the other party to the transaction.

We agree that it is an excellent authority.

In the *Hellenic* case, the court made a complete and exhaustive study of the law including the *Hartsville Mill* case.

The court pointed out (p. 757):

> ". . . it is obvious that there is no line of absolute demarcation between fear that deprives a person of free will and judgment and lesser degrees of fear . . . moreover the nature and extent of the pressure is inseparable from the subject. The pressure must be improper and excessive in going beyond what is reasonable under the circumstances in order to constitute either duress or undue influence."

The court further pointed out:

> "A key element today is the state of mind of the person threatened. This is not to say that the existence of choice necessarily disposes the existence of duress."

The court went on to quote Mr. Justice Holmes that choosing the lesser of two evils is a "characteristic of duress."

Automatic Radio was a case involving a mere threat to resort to civil litigation which the court held was insufficient in and of itself to constitute duress under the facts of that case referring to a patent licensing agreement.

The case adds nothing to the petitioner's claim for certiorari.

Where the Court of Claims under an undisputed factual situation has merely determined that the contracting officer should have used, the contract clause referring to unforeseeable delays instead of a threat of cancellation unless his demands are met, the court has acted fully within its powers. (*United States* v. *Utah Construction Co.*, 384 U.S. 394, (416-417).

The foregoing thirteen cases cited in footnote 14 of petitioner's brief (p. 13) are a very small fraction of the state and federal cases in which the matter of duress is discussed.

They were apparently selected because they are opinions in which the various courts in some of the cases referred to the BAD FAITH of the "duressor."

The conclusion which petitioner desires to force upon this court is that this court should adopt a rule for all federal courts that if the "duressor" knows that he is acting in bad faith in the threatening contract termination, then this act may constitute dur-

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ess, but if he testifies that he thought he was correct in threatening contract termination, it would not consitute duress.

It is obvious that this is not the function of certiorari, and of course, could never be the law. Duress is universally held to depend on the factual situations of each case and depends in some cases on such variables as the personality of the individual "duressed."

However, the Court of Claims in *Urban* did not lay down a "per se" rule of duress as claimed. In this case, the undisputed evidence was that the contracting officer knew that the government had delayed the contractor, refused to consider factually a reasonable time which that delay caused the contractor, and offered a time extension which was determined by the Board of Contract Appeals to be obviously inadequate knowing that even if the contractor should accept it that the government itself could not because he had been secretly notified by the base engineer that he would not permit a shutdown of any heating equipment during the Alaska winter in order to make the changeover (Pet. Br. App. 32-33). In order to force the contractor to accept the 245-day extension, he threatened cancellation, a situation which the Board of Contract Appeals found to be unthinkable in the heart of the most severe winter ever recorded in Alaska, a finding which was accepted by the Court of Claims and not opposed by the government in the Court of Claims or elsewhere.

It was a matter of law. (*W. R. Grimshaw* v. *Nevil C. Withrow Co.*, 248 F.2d 896 (C.A. 8).

An examination of supplemental decisions to the annotation in 79 A.L.R. 655 regarding "business compulsion" discloses that there are 78 cases cited in addition to those cited in the annotation. Those 78 cases are from 24 jurisdictions. Petitioner cites only 13 cases relating to all types of duress from five jurisdictions while two additional jurisdictions cited admittedly were contrary to petitioner's claim.

It might be interesting in passing to note that in a dissenting opinion in *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, in 1958, Justice Harlan stated in respect to the tenacity of the Court of Claims:

> "The Court of claims certainly not given to the easy allowance of demands upon the public treasury faced up to what the Constitution plainly requires in this instance."

When the petitioner claims (Pet. Br. 14) that the Court of Claims had adopted a "per se" rule relating to duress, it is grossly unfair and totally in error. A reading of the Court of Claims' opinion will totally dispell any such contention.

Reading the petitioner's claims objectively, it is believed that petitioner wishes this court to put its stamp of approval on the conduct of the contracting officer in threatening termination for events for which the government bore the sole responsibility.

A holding to the contrary is no jeopardy to the government's negotiating position as this case bears

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witness. The contractor has sustained *government-audited* out-of-pocket direct (no overhead, profit, etc.) expenses of $80,000 due to it since 1962 (interest alone at 6% is 42%). It has had the additional privilege of paying for litigation cost and travel expense from Fairbanks, Alaska, to Dayton, Ohio, to San Francisco, California, to Portland, Oregon, to Washington, D. C., in addition to helping finance the government's defense of this case in opposition.

In quoting statistics, one can not help but inquire how many well-founded claims have been denied merely on account of the citizen's inability to finance the steps in litigation through which the government at taxpayer's expense may take an opposing litigant. The contract officer needs no further weapons in his arsenal to deal with recalcitrant contractors.

The "government" (all of us) had the benefit of the contractor's work, labor, skill, and money, and it surely should compensate it fairly, and the first ground for certiorari would appear to be untenable.

The Wunderlich Act permits the Court of Claims to find exactly as it did, and no ground for certiorari would appear to exist unless the court wishes to generally exercise its discretion (Part V, Rule 19, Rules of the Supreme Court).

The other ground stated in support of the petition (Pet. Br. 15) is that the Board rejected the finding of the Board, and "in effect" entered its own findings contrary to the mandate of the Wunderlich Act, 41 U.S.C. 321 which confines the Court of Claims'

review of facts to a determination of whether or not there was "substantial evidence" to support a fact found by a contract board.

Because of what would appear to be a mistaken belief as to what the Board of Contract Appeals actually found, the petitioner arrives at a completely erroneous conclusion.

Petitioner assumed that the Court of Claims reexamined the factual matter of whether or not a contractor in submitting for approval or rejection a product which did not conform in exact particulars to a "named brand" contributed to the delay in performance of a contract by offering such a submittal (Pet. Br. 17).

It was admitted, however, that the claimed reexamination of factual matter was "in effect" accomplished by ignoring "substantial evidence." (Pet. Br. 17).

That belief is mistaken because the submission of a product for approval or rejection was exactly what the contractor had a duty to do under the contract even as to brand-name products called for by the specifications. The interpretation of contractual provisions are legal matters on which a Board's decision is not final under the Wunderlich Act.

There was simply never an issue about that matter, and of course, the court ignored it.

Both the Board and the court found that the failure to appoint an approval engineer and an extended

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period in rejection after such an appointment was finally made were the causes of delay. There was no dispute in evidence, and there was and is now no dispute as to the determination of that fact.

The matter upon which counsel mistakenly relies is whether or not the products submitted were or were not in conformity to the "or equal" clauses of the specification, a point which was completely unnecessary to the Board or the court's determination of the case, and concerning which there was not any issue.

The other matter to which petitioner refers was not an issue either before the board or before the court (Pet. Br. 19). That reference related to the Board's statement relating to the coal thaw shed which was a portion of the contract completely unrelated to the matter of delay relating to "approval or rejection" of drawings.

No evidence (except incidental) was ever directed toward delay in the coal thaw shed. The government had never at any time prior to the hearing made a contention about any such delay or its relation to the total performance of the contract. A prehearing order was entered into between the parties defining the issues. Delay in the completion of that portion of the work was not in issue ever. The prehearing order was printed as Exhibit A to plaintiff's motion for summary judgment in the Court of Claims (Tr. 28 and 31-2).

Neither the question of delay resulting from sub-

mittals was made an issue nor was any question of delay in completing the coal thaw shed. The reference by the Board of Contract Appeals to the fact that it could only find three days' delay in the coal thaw shed work caused by the government was a mere gratuity. No evidence was ever directed toward that point since it wasn't an issue.

As stated in the brief before the Court of Claims, if it *had* been an issue, the evidence would have shown that the work in the coal thaw shed was completed at the time of the extension and that no one made any reference at any time to any delay (Ct. Cl. Br. 68-9).

Citations as to the second point (Court of Claims' review of decisions of a board) admit that the Wunderlich Act was intended to liberalize the review of decisions of such boards in the same manner as could any other reviewing court (Tr. 16).

But, complains petitioner, the Court of Claims is going beyond its authority.

In support of this contention, it cites *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394, and *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424.

Bianchi and *Anthony Grace* have previously been discussed, and are not applicable since nothing this court has done in the *Urban Plumbing* decisions conflicts with those decisions. The Court of Claims has

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not created a new record by its own commissioner as was attempted on *Anthony Grace*, but on the contrary has exactly conformed to the suggested dispositions outlined in the *Grace* and *Bianchi* decisions.

The Court of Claims certified the administrative record in this case (*Urban Plumbing*) to one of its commissioners who found the record did not contain any factual question to review, and returned it to the Court of Claims for purely legal determination.

Utah Construction (1966) was a case in which the contractor was to build a facility for the Atomic Energy Commission. The contract provided that factual disputes should be determined by the contracting officer subject to appeal to the head of the department whose decision was to be final and conclusive.

After completion, the contractor filed claims for additional compensation and time extensions pursuant to the "changed conditions" clause of the contract.

The Board of Contract Appeals:

1. Denied the request for time extension and damages for the "pier drilling" claims on the ground that the increased costs were incurred by the subcontractor rather than the contractor and that the delay was caused by a dispute over government-supplied concrete aggregate which was a matter not before the board.

2. Denied compensation for but allowed additional time for the "shield window" claim.

3. Ruled that the appeal from the contractor's rejection of the claim for additional compensation for poor quality aggregate was untimely and remarked that if the claim was based upon unliquidated damages for breach of warranty or delay, it (the board) had no jurisdiction to grant monetary relief.

Respondent filed a direct action in the Court of Claims for breach of contract asserting government-caused unreasonable delay.

The Court of Claims held that the "pier drilling" and "shield window" claims were primarily for breach of contract and ordered a trial de novo on the factual issues in those claims.

It held that since the concrete aggregate claim was for "breach of contract" rather than "arising under" the contract, the factual issue should be resolved in a judicial trial.

The Supreme Court granted certiorari and affirmed the court on the proposition that liability for breach of contract claims do not lie within the jurisdiction of the Board of Contract Appeals and further held that contractors do not need to process breach of contract matters through the Board of Contract Appeals before filing suit in the Court of Claims.

The court found that the claim of poor quality aggregate was a claim for breach of contract and affirmed the Court of Claims.

As to the "pier drilling" and "shield window"

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claims, the court agreed that the board lacked authority to consider "delay damages" for those claims.

However, the court held that the board did have authority to consider time extensions under specific contract provisions, and if those requests called for "fact finding" such facts would be (if properly supported) conclusive on the parties, not only under the contract provisions but also under the court action for breach of contract and delay damages.

The court then discussed the doctrine of "collateral estoppel" and the needless duplication of "evidentiary hearings." (p. 420 et seq.).

It is thus apparent that *Utah Construction* was concerned with the distinction between breach of contract cases not within the board's jurisdiction and factual matters under the contract which were within the board's jurisdiction.

The court pointed out that no matter what the claim is labeled or what action the board may have taken, the board had no jurisdiction of claims for breach of contract even if it considered and passed upon those claims.

In Urban Plumbing, the stipulated issue before the Board of Contract Appeals was whether or not a contract modification constituted an "accord and satisfaction."

The government claimed it did, and the contractor cliamed that it did not. The contractor claimed that it did not for several reasons: (1) No meeting of

minds; (2) no consideration; (3) lack of reality of assent (duress) etc.; the contractor also claimed that the construction of the modification after its language was changed was understood to permit a claim for additional costs should such added costs materialize under the extension demanded by the government."

Both the contract provisions and the Wunderlich Act provided that the contracting officers' decision, that of a department head or other fact finder should not be final on a question of law.

What constitutes an accord and satisfaction is a legal question. The board's opinion made no reference to that legal question except to hold that there was no duress because when the time set for performance of the contract had expired (even though admittedly, the fault of the government), the contractor was "in default" and the contractor had a right to cancel the contract, and when he threatened to cancel the contract, he did what he had a legal right to do.

That finding is now (for the first time) admitted to be in error (Pet. Br. 20, n. 17).

But says the petitioner even if in error, the court must remand to the Board to redetermine that matter after instructing the Board as to the proper law, and the Court of Claims can not for itself determine whether or not the action of the contracting officer constituted duress.

Where the facts are not in dispute, the matter always becomes a question of law (*W. R. Grimshaw Co.* v. *Nevil* v. *Withrow, supra.*

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The undisputed facts are that the government delay in appointing an approval engineer, and in rejection or approval of products submitted was the cause of the need for a contract extension.

The contract modification itself so states.

The Court of Claims examined the evidence carefully. It stated that it believed that the board had so found as a fact but that if it had not, it would so find because there was no substantial evidence to the contrary, and minds could not differ as to the evidence (Pet. Br. App. 21).

How then can petitioner claim that the Court of Claims ignored evidence when the opinion itself states that the court carefully examined the evidence?

As repeatedly stated, the evidence was from petitioner's files and its own witnesses by which it is bound; the contract modification says the reasons upon which it was based.

It can only be concluded that the claim for certiorari comes from the conclusion of some government counsel unfamiliar with the records of this case because the basic propositions are admitted both factually and legally or are based upon findings which petitioner itself claims are conclusive.

Respondent has read the cases cited in page 22 of petitioner's brief. Many of those have been cited in the briefs before the Court of Claims. It is apparent that petitioner believes the Court of Claims in those cases has reviewed and rejected administrative findings.

Respondent finds no basis for such a conclusion from a reading of the decisions of those cases.

If petitioner knows of facts not apparent from the various opinions on which the judgments were based, respondent is not in a position to comment thereon without access to the same information if any exists.

A reading of the various opinions indicated to respondent that in almost all if not all of the decisions, the Court of Claims has been extremely careful to follow the Wunderlich Act, and the decisions of the Supreme Court, in each case, explaining any variations which might be misleading:

But whether that position is correct or incorrect, the case of *"Urban Plumbing"* does not fall within the factual matter of those cases (particularly [1]*Woodcrest Construction Co.* v. *United States*, 408 F.2d 406, which petitioner seeks to associate with the petition for certiorari in this case). Nor does *Urban Plumbing* fall within the prohibition of analogies of the *Utah Construction, Anthony Grace* or *Carlos Bianchi* decisions of this court.

The court here did not treat this cause as a breach of contract case, but actually did exactly as petitioner claims it should have done: It adopted a board finding: (1) that there was admitted delay under the

[1] Woodcrest was referred to a court of claims commissioner for factual hearings and was decided by a divided court. Urban was referred to a court of claims commissioner who made no factual review and returned it to the court of claims for determination of the legal matters. The Urban case was decided by a unanimous court.

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state of facts; (2) that there was a finding that the delay was admitted by the fault of the government; (3) that there was machinery under the "equitable adjustment provisions under the contract to determine a just compensation; and (4) directed that the board should proceed to make an equitable award to the contractor under the contract.

For the reasons stated, the petition should be denied.

WARDE H. ERWIN